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IN THE

Supreme Court of the United States

1971 TERM

WILLIAM HENRY FURMAN,
Petitioner,
v.
GEORGIA,
Respondent.
NO. 69-5003

LUCIOUS JACKSON, JR.,
Petitioner,
v.
GEORGIA,
Respondent.
NO. 69-5030

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Pursuant to leave granted Respondent by the Court to file a Supplemental Brief, after argument, the State of Georgia submits the following points and arguments in furtherance of the intentions expressed in its motion:

1. STATE PENALTIES

Insofar as the Eighth Amendment is concerned, it must be remembered that the amendment was intended, when adopted, to apply only to the federal government, and that the amendment was not considered applicable to the states until the 1962 case of *Robinson v. California,*

if then, and in that instance only by virtue of the Fourteenth Amendment due process clause. Since the Fourteenth Amendment was not adopted until 1868, it would appear that it could have no effect on the penalties adopted by states *prior* to 1868 and in existence at that time. The death penalty as a maximum punishment for murder and for rape was well-settled in Georgia prior to the adoption of the Fourteenth Amendment. This Court said in *Coffey v. Harlan County*, 204 U.S. 659 (1907):

> "It is within the power of the state to enact laws creating and defining crimes against its sovereignty, regulating the procedure in the trial of those who are charged with committing them, and prescribing the character of the sentence which shall be awarded against those who have been found guilty. In these respects, the state is supreme and its power absolute, and without any limits other than those prescribed by the Constitution of the United States. The exercise of the power of the state in this field cannot be drawn in question in this court or elsewhere than in its own courts except for the purpose of restraining it within the limits thus established. One of the limitations upon the power of the state, imposed by the 14th Amendment, is that the state shall not deprive any person of life, liberty or property without due process of law." *Id.* at 662-663.

To accept Petitioners' contentions would result in the State's traditional penalties being declared unconstitutional on the basis of an amendment which did not apply to the states and which may only recently have been "incorporated" into the century-old guarantee of due process by the states. To say that the Fourteenth Amendment prohibits the states from imposing the death penalty because the Eighth Amendment forbids the federal government from imposing it for crime, is

to say that the penalties in force in the states in 1789 and 1868 were wiped out by the Fourteenth Amendment which imposed certain restrictions on the states. But the Fourteenth Amendment *reserved* the right of the states to authorize that penalty under protected circumstances, because the Fourteenth Amendment provides that the states cannot take life without due process of law, the converse of which is that the states *may* take life *with* due process of law. Thus, the Fourteenth Amendment itself worked the *reverse* of incorporation of any prohibition of death penalty which may be found in the Eighth Amendment.

2. UNUSUAL PUNISHMENT

The Eighth Amendment forbids *not* punishment that is "rarely" imposed, but unusual punishment, that is, punishment which is unusual in its nature. That meaning comports with its historical context derived from the Bill of Rights of 1689 which sought to ban the punishments imposed during the reign of the Stuarts.

With respect to the death penalty, that meaning also comports with the Framers' inclusion of it in the Constitution by reference in the Fifth Amendment to capital crimes, and reference in the Fifth and Fourteenth Amendments to prohibition against the state and federal governments taking life, liberty or property without due process of law.

Death is not an "unusual punishment." It is statutorily provided for with respect to a wide variety of crimes throughout the United States, including murder, rape, treason, kidnapping, aircraft hijacking, armed robbery, and so on.

Thus, in the context of Constitutional meaning, inci-

dence of imposition is irrelevant to an application of the Eighth Amendment to a particular punishment.

3. CONSTITUTIONAL STANDARD

The constitutional prohibition on punishment which is cruel and unusual demands, by the character of the prohibition, a consideration of factors which are subjective. The reason is that the description or designation of something by the use of the adjective "cruel," at least, involves the operation of the designator's opinion, judgment, attitude, beliefs. What may be "cruel" in one person's opinion may not be "cruel" in another's. Factual information fed into a computer will not tell us whether something is, or is not, cruel. The exercise of subjectivity is inescapable.

However, this is not to say that the determination of whether a particular punishment is unconstitutionally cruel and unusual is therefore relegated to measurement by shifting opinions of different courts and different judges from year to year. The prohibition's character does not degenerate it into a law of man, an opportunity for judicial imposition of an individual's personal tastes. Rather, it calls for a broad perimeter of subjectivity and a narrowly circumscribed injection of one's own notions.

The "broad perimeter" is established by benchmarks such as "unconscionable," "shocking to the conscience of reasonable men." The question is not whether the punishment is simply "cruel" in the jurist's way of thinking, and thus outside the context of the Constitution, but whether the punishment is so cruel that it is unreasonable, unconscionable. The distinction is, indeed, one of degree and it may be the difference between the question addressing a legislature and the constitutional question addressing the Court. It is for the legis-

lature a philosophical question, as to whether the death penalty is justified and should be authorized for certain crimes; it is for this Court a legal question, confined to legal considerations in the making of a judgment on this point of constitutional law. Thus, we are not dealing with the expediency, wisdom, or efficacy of the punishment, but with the true interpretation of the Constitution.

The subjectiveness inherent in the viability of "cruel and unusual punishment" as a measurable constitutional concept thus becomes largely objective when construed broadly and not in the narrow confines of current polls and statistics, as Petitioners urge.

In the same way, the standard of "decency" can be defined so narrowly that it becomes a matter of how many people think it is decent and how many people think it is not decent, with the ultimate determination grounded on the jurist's personal opinion. In order to have any validity as a yardstick of the constitutionality of punishment, the guide must measure only whether the punishment is one which no reasonable man could rightfully support. From this angle, the Court should have little difficulty in determining whether as a matter of law a challenged punishment was inside or outside the prescribed limits, as the Court's knowledge of standards of decency more or less universally accepted would not require examination of statistics and polls or expert opinion or other types of factual evidence.

In construing the Constitution, the utilization of "standards of decency," if that is appropriate to test whether the specific action is constitutional or not, must be broad and generalized in order that constitutional principles not be ad hoc and episodic, but rather

mindful of reconciliation between the needs of continuity and of change in a progressive society. It is submitted that it would be outside the limits, that is, the outer boundaries, of civilized standards only if it is "clearly and manifestly" cruel and unusual punishment. See *Bailey v. U.S.*, 74 F.2d 451, 453, (10th Cir. 1934). It is the legislatures on the other hand, with their facilities for research and hearings and other fact-gathering methods, that can draw the fine line as to which punishment would be the most desirable in terms of the objectives sought.

In this context, then, can it be said that the imposition in 1968 and the carrying out in 1972 of the death penalty for the totally unprovoked pistol-slaying of 29-year-old William Joseph Micke, Jr., or the terroristic assault and rape of Mrs. Mary Rose, a young mother, are universally regarded as contrary to human decency? The timeless question, insofar as it faces this Court, is "whence justice?"

4. "MATURING SOCIETY"

The death penalty is *more* appropriate for a maturing society: as the society becomes more enlightened, so greater becomes the breach between murder and rape on the one hand and responsible conduct by its members on the other. Thus, the imposition of the death penalty in appropriate cases:

(1) Enhances the dignity of man (the criminal, the society, and the victim);

(2) Places a greater gap between violent crime and what is expected of the responsible citizen;

(3) Demands greater safeguards to assure it is arrived at by due process;

(4) Expresses society's utter condemnation of capital crimes.

Death as a viable penalty has a unique relevancy in the "maturing society": does it *enhance* the dignity of man or the sanctity of human life to allow a citizen's life to be brutally, arbitrarily, senselessly snuffed out by the wanton hand of a fellow citizen, or to allow a woman's unwilling body to be outraged and defiled and her mind perpetually scarred by the lustful attack of a man who utterly disregards her dignity, *not* to demand the perpetrator to forfeit his life? The giving of life is regarded as the highest sacrifice. Does it not then *enhance* the dignity of man to require this sacrifice when the highest ideals are violated, such as the sanctity of human life, in the case of murder, and the sanctity of virtue, respect, honor, regard for the inviability of the most intimate and personal aspect of womanhood?

To say that we will *not* require this ultimate sacrifice by the perpetrator is to diminish the enormity and reprehensibleness of the crime. To say that the ultimate sacrifice will no longer be required is to give a measure of acceptance to the crime, to say that it is not so bad that we must exact the life of the offender. Such a step is not progressive, is not illustrative of greater enlightenment, but rather marks a laxity in the kind of conduct society demands of its citizens. Is the freedom of the members of our society, or is civility *enhanced* by the constitutional abolition of capital punishment for crime?

As a principle of fundamental justice, the enormity of the crime requires taking a perpetrator's life in response, in appropriate instances; it is a manifestation of proportioned punishment.

5. SCALE OF PENALTIES

To accurately measure whether as a matter of constitutional law, death constitutes a cruel and unusual punishment, the punishment must be examined in its place. That is, consideration should be given to its position in the scheme or scale of punishments which are widely and traditionally imposed and about which there is no contention of unconstitutionality.

Thus, consideration of the penalty of death as cruel and unusual should take into account that punishment by incarceration and loss of freedom and liberty is a standard mode of punishment, with variables such as hard labor, solitary confinement, work release, etc., modifying incarceration in some instances. The other widely-used punishment is, of course, the extraction of fines. On a whole, however, punishment as such has not been abandoned, but rather is vigorously in mode. Death is the ultimate penalty, regarded as the next step after life imprisonment, in the severity of punishment scale. It is in reality the ultimate degree of deprivation, because a man is deprived of his life whereas in the mode of punishment by fines he is deprived of his property and in the incarceration mode, he is deprived of liberty.

In the scheme of punishments, it carries no weight to say that this ultimate punishment is unconstitutionally "unusual" because by its very nature, it is regarded as appropriate only for very severe crimes; hence, by its very nature, it is applied rarely and such a fact does not debilitate its constitutionality.

So viewed, can it be said that death is so far out of the scheme of widely acceptable punishments, that it is not a part of the scheme and thus is cruel and unusual

punishment? It is urged that a comparison of the cruelty and unusualness of life imprisonment is not so far more "dignified" or "humane" that in comparison, death is constitutionally forbidden. It is at least subject to question whether it is more in keeping with the dignity of man to require a man to spend the remainder of his life imprisoned in one of our current penitentiaries, subject to increasing demoralization and deterioration, than to require the capital felon to forfeit his life in a dignified manner.

6. BENCHMARKS

To be stricken as unconstitutional, the death penalty must be so cruel and unusual that it deprives a State prisoner of due process of law; it must be so cruel and unusual that it exceeds the outer boundaries beyond which State legislatures may not travel; it must be so cruel and unusual that, regardless of the enormity of the crimes sought to be punished and curtailed, it cannot be considered by the State legislature.

It is not necessary to fix that boundary in testing the death penalty because it is not a penalty of such cruel and unusual magnitude that it will fall clearly on one side or the other of that fine line. It is much within that boundary, as measured by the guideposts previously utilized in determining whether a particular punishment is, or is not, "cruel and unusual punishment." The death penalty does not approach that fine line, because it is not inhuman to deprive one of life as a consequence of his own anti-social, voluntary behavior, because it is not barbarous ("uncivilized"; "mercilessly harsh or cruel"; "offending against contemporary standards of correctness"). Nor is it torturous ("inflicting intense pain"; "anguish of body or mind"; "agony"; "to pun-

ish or coerce by inflicting excruciating pain.") Nor is it so disproportionate to the gravity or enormity of the crime that it is cruel and unusual punishment. Nor was it arrived at in the manner so lacking in due process that it is rendered cruel and unusual punishment. Nor is it cruel and unusual punishment in view of what is sought to be accomplished. Nor is it "cruel" ("disposed to inflict pain; causing or conducive to injury, grief or pain").

7. BREADTH OF APPLICATION OF PENALTY

Petitioners assert that the penalty is cruel and unusual punishment because it is not generally, even-handedly, or non-arbitrarily applied, and that if uniformly applied to all persons liable to it, it would be unacceptable to "the people." Such an argument would undoubtedly render all maximum penalties unconstitutional, because while it is true that contemporary society would probably not accept the imposition of current maximum penalties for every offender for murder or rape, the same is true for any other crime (such as 20 years for every burglary and every burglar, 10 years for every aggravated assault, 10 years for every first degree forgery and every such forger).

The argument is no more than a demand that we revert to a system of mandatory penalties fixed for narrowly-categorized crimes so that regardless of mitigating circumstances or the personal history of the defendant, the death penalty (or any other penalty for that matter) would be automatic once guilt was determined. It is difficult to see how such a wooden approach would be constitutionally mandated, particularly when the discretion of the jury has been regarded as the intervention of the voice of the society against which the

crime was committed, the necessary ingredient of community expression through community representatives. The attack here is therefore no more than a manifestation of distrust in the jury as the determiner of punishment; the attack does not reach the penalty per se. The individualization of penalty which is allowed by the flexible minimum-maximum concept does not lead to the conclusion that the penalty is therefore arbitrarily applied.

Even if such a conclusion were valid, it would be dissolved by the further classification of murders and rape and a provision that only class one murders (whatever their characteristics or elements would be) and class one rapes (again, whatever their elements would be) are punishable by death, mandatorily. Likewise, the "arbitrary application" argument does not reach the constitutionality of the penalty per se.

It is interesting to note that the campaign against "standardless juries" was grounded in great part on the argument that specific direction should be given to juries having discretion to fix penalties within a minimum-maximum framework, to take into account mitigating circumstances and personal information concerning the defendant in order to treat him individually and less harshly than others convicted of the same type of crime. The argument is thus turned around when one receives the maximum: the sentence was arbitrary to him, whereas to the defendant who receives the minimum, the jury "justly" gave way to mitigation. Petitioners have not shown, however, that they were treated unfairly by the juries determining sentence.

8. CRIME VS. CRIMINAL

The picture is askance if it is viewed only from the

point of view of the condemned criminal. The Court must look at the penalty from the point of view also of society, of the victims in these cases and future victims of violent crimes, of the capabilities of current law enforcement as well as the capabilities of current penal systems. It is only when society can be protected from violent crime, when a free society can be assured, when violent crime can be prevented, when we can so rehabilitate the capital felon that he can be returned to society with a reasonable guarantee of non-repetition, in a word, when the penalty becomes unnecessary, and without use or a legitimate purpose, or without redeeming social value, that we can declare its imposition unconstitutionally cruel and unusual punishment.

That day, unfortunately, may never come and a belief in this prognosis may well have led the Framers to say: "Nor shall any State deprive any person of *life*, liberty or property without due process of law."

9. GOVERNMENT'S RESPONSIBILITY TO PROTECT

Petitioners make the mistake of looking only at the convicted criminal, with respect to punishment, and not to society as a whole and to the victim:

> "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Cardoza, J., *Snyder v. Mass.*, 291 U.S. 97, 122 (1934).

The death penalty is a means of self-defense for the members of society. Capital crimes violate the imperative of social preservation. The contest is not between the State and the individual; it is wholly between competing rights of the individual – the right to be protected

from criminal attack and the several rights in the Amendments. *State of New Jersey v. Bisaccia*, 279 A.2d 675, 677 (S.Ct. N.J., 1971). As said in that case, "'The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says":

> "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Invalidating the death penalty per se, for any or all of the reasons advanced by Petitioners, betrays the high ideals of justice, tranquillity, common defense, welfare, and liberty which have long been the goals of our social order. Retention of the death penalty ensures a greater fear in the potential criminal and thereby contributes to a more civilized society wherein citizens may live and move with a diminished apprehension of criminal attack such as that which has curtailed general activity in more than one city of late. Forbidding the imposition of the penalty can do no more than foster social permissiveness among law-breakers at the cost of social permissiveness among law-abiding citizens.

10. ROOT OF THE "EVILS" ALLEGED

Petitioners' arguments against the death penalty per se are due process or equal protection arguments which, if proved, could be corrected and would only apply to the particular cases and *not* to the penalty as such. Their arguments do not show that the death penalty is *inherently* cruel and unusual punishment. The assertion

is, in effect, that the death penalty was arrived at by a procedure which violated or lacked some concept of constitutional law. As is illustrated by the vast number of corrective decisions which this Court has rendered in the area of criminal procedure in the past decade, defective procedures can, and indeed should, be remedied. Such an appropriate course in no way impugns the validity of the death penalty per se.

Looked at from another angle, the strict standards which must be adhered to in obtaining convictions, and the jealous safeguard of accused's rights which by legislative action and judicial decree guarantees the most fair trial possible in the world today, justify the imposition of the ultimate penalty in appropriate cases, because it will be arrived at in a manner adhering to constitutional "fair trial" procedures. Thus, the cautious ascertainment of proper procedure has enhanced the fairness of the ultimate sentence to a degree not heretofore known, and this care-taking should render the death penalty even more viable because of how it is arrived at.

Petitioners argue that the death penalty is meted out arbitrarily and discriminatorily to Negroes. But it must be remembered that both Furman and Jackson were tried in the latter months of 1968, *after* the Georgia jury selection system was corrected to expunge the element of prima facie discrimination which arose from the use of segregated tax digests as a source of jurors, by substituting the voter lists.* The potentiality of ra-

*See Ga. Laws 1967, pp. 251-252 (Ga. Code Ann. §59-106). Furman, tried on September 20, 1968, had challenged the juries, relying on the record in *State v. Simmons* (R 11-DD, 11-EE *et seq*). This record shows no evidence of discrimination. As said by the Supreme Court of Georgia on the appeal in *Simmons v. State*, 226

cially discriminatory juries was erased in both of these trials. It is also compellingly pertinent that the scrupled juror objection, which invited a presumption of death-prone penalty selection in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), has also been avoided in the trials of Jackson and Furman.

11. EFFECTS OF DECLARING DEATH PENALTY UNCONSTITUTIONAL

Some of the most obvious results of taking so drastic a judicial step would be:

(1) The Fifth and Fourteenth Amendments will in effect have been rewritten. The reference to "capital . . . crime" in the Fifth Amendment would become meaningless; so would the reference to "jeopardy of life," as well as the mandate against deprivation "of life" without due process of law, which also appears in the Fourteenth Amendment as a curtailment of the states. Thus, four specific circumscriptions which recognize the existence of death penalty in the context of constitutional permanence, would become superfluous appendages, at the very least.

(2) The ultimate penalty will not be available for unknown crimes which may arise out of the ongoing developments generated by our society.

(3) A penalty which has been a part of criminal jurisprudence since time immemorial, and part of ecclesiastical jurisprudence in numerous societies throughout the ages, will be excised from

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Ga. 110, 111 (1970): "On the other hand, the other evidence on this question showed a conscientious effort on behalf of the jury commissioners to select a *cross-section* of citizens, Ga. L. 1967, p. 251 (Code Ann. §59-106), and one of the commissioners was a Negro." Jackson was indicted and tried several months later, on December 10, 1968.

our current and future systems, *not* because it is contrary to our fundamental concepts of fairness and justice, and *not* because it is disreputed by the people through their governmental processes; through their representatives, the legislators and juries, but merely because it purportedly does not comport with some people's sence of decency. Such a basis for constitutional voidance is not legal but political.

(4) The will and expression of the people of the majority of the sovereign states, expressed through their legislators and the juries, and the almost uniform consensus of judges and appellate courts rendering judicial review, will have been conclusively defeated.

(5) The availability of the penalty and its application in appropriate cases will be lost as unmistakable notice of the total unacceptance of capital crimes and as clear warning to those who contemplate such acts. It will be lost as a viable guardian of a *free* society.

CONCLUSION

It has not been demonstrated that the death penalty for the crimes of murder and rape, illustrated by the specific instances of those crimes spread on the records of these cases now before the Court, is excessive or disproportionate to a constitutional degree, barbaric, contrary to commonly-held notions of human decency, unnecessarily or inherently cruel. Petitioners have not met the burden of proving that the legislatively-provided penalties are contrary to the constitutional principles invoked.

The Constitution does not demand the abolition of forfeiture of life as a penalty for crime and as a weapon against crime by way of its existence as a threat; the

Constitution does not demand that the balance of fear weigh more heavily on the citizen than on the potential capital criminal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, Attorney of Record for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief for Respondent on the Petitioner by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

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